BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PATRICIA UMLAND Claimant	)	
V.	)	
ANGELS AT HOME CARE Respondent	)	Docket No. 1,074,232
AND	)	
ZURICH AMERICAN INSURANCE Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 21, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to sustain her burden of proving appropriate notice of accident was provided to respondent within 20 days. The ALJ denied claimant's preliminary hearing requests.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 16, 2015, Preliminary Hearing and the exhibits, and the transcript of the September 1, 2015, evidentiary deposition of Kate Valentin and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues she provided proper notice of her injury, and respondent had actual knowledge of the injury. Claimant contends she is entitled to temporary total disability (TTD) benefits beginning April 5, 2015, and medical treatment should be authorized with Dr. Joseph Sankoorikal.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues claimant did not provide notice within 20 days of the accident, failed to provide adequate information regarding the accident as required by K.S.A. 2014 Supp. 44-520(a), and failed

to make it apparent she was requesting benefits under the Kansas Workers Compensation Act. Further, respondent argues the ALJ's decision must be based on claimant's lack of credibility, and the Board should give deference to these findings.

The issues for the Board's review are:

1. Did claimant provide appropriate notice of injury by accident to respondent?

2. Is claimant entitled to TTD benefits beginning April 5, 2015, and continuing until such time she is at maximum medical improvement (MMI) or offered accommodated work?

3. Should Dr. Sankoorikal be authorized to provide medical treatment to claimant?

FINDINGS OF FACT

Claimant began working for respondent as a caregiver in April 2014. In this position, claimant provided care for clients in their homes. Each of respondent's clients had a logbook in which caregivers recorded the events of each shift.

Claimant testified she hurt her back while transferring a client on or about March 5, 2015. Claimant worked from 7:30 p.m. to 7:30 a.m. on March 6, 2015. Claimant stated she informed both office manager Paul "Trey" B. Bicknell, III, and director Kate Valentin of the incident the morning of March 6, 2015. She testified:

> Q. Okay. But you had talked to Trey about the back condition that morning, but you didn't talk to Kate that day about it?
>
> A. That day, yes, I did. I called her around 11 o'clock in the afternoon.
>
> Q. Okay. What did you talk to Kate about that day?
>
> A. I told Kate that I hurt my back assisting [the client].
>
> Q. Okay. So in the morning you talked to Trey about it and then at 11 o'clock or so you talked to Kate about it?
>
> A. Yes, I did.
>
> Q. Okay. And what did you tell Kate?
>
> A. I told Kate that I hurt my back assisting [the client] to the restroom.[1]

[1] P.H. Trans. at 16-17.

Mr. Bicknell disputed claimant's testimony. Mr. Bicknell testified any notice of a work-related accident would have been entered in respondent's caregiver notes and reported to Ms. Valentin per respondent's policy. No mention of claimant's back pain was entered in the caregiver notes until March 19, 2015. The entry states, "[Claimant] called in for her shift tonight because she said she went to the dr [*sic*] because her back was hurting."[2] Mr. Bicknell recalled the conversation and noted claimant never told him her back hurt due to a work-related accident.

Claimant testified she recorded the incident in the client's logbook.[3] However, there is no mention of claimant hurting her back in the client's logbook.

On March 18, 2015, claimant went to the emergency room at Stormont-Vail Healthcare (Stormont) for back pain. Claimant provided a history of back pain with an onset one week prior while lifting a 300-pound client.[4] She also stated her legs went numb the previous night, causing her to fall. An MRI was completed, which revealed degenerative changes in her lumbar spine. Claimant was given pain management and discharged from Stormont the following day.

Claimant testified she sent text messages to Ms. Valentin while in the hospital informing her that she would be unable to work. While claimant made available text messages to Ms. Valentin spanning from January 22 through April 8, 2015, she could not produce text messages dated March 18 or March 19, 2015. Claimant testified she had multiple phones and the subject text messages were lost. Ms. Valentin disputed claimant's testimony, stating she never received text messages regarding the hospital stay. Further, Ms. Valentin testified she was not informed of claimant's back injury on March 6, 2015; she was unaware of any workers compensation claim until receiving a letter from claimant's attorney dated June 17, 2015. Ms. Valentin noted she received the medical report, hospital bill, and MRI findings related to claimant's Stormont visit sometime after March 27, 2015. The MRI findings indicated claimant had sustained a work-related injury, but the medical report did not, and the hospital bill listed claimant's personal health insurance. Ms. Valentin noted claimant did not speak with her about the information from the hospital or approach her about a workers compensation claim. She testified:

> Q. Okay. Before [June 17, 2015], were you aware that [claimant] was making any claim for benefits under the Workers' Compensation Act?

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[2] *Id*. at 68; Resp. Ex. B at 2.

[3] See *id*. at 33-34.

[4] Claimant testified at the preliminary hearing that she *assisted* the client; she did not *lift*, as noted in the records and in the Application for Hearing filed June 22, 2015. Claimant also indicated the client weighed approximately 180 pounds. (See P.H. Trans. at 33.)

A. No.

Q. Before that date, had [claimant] or her attorney ever provided you with any information on the date of accident or a time of accident?

A. No.

Q. Did [claimant] ever tell you about the particulars of how she was injured? In other words, did she ever at any point during her employment tell you that she was injured while assisting to lift [the client]?

A. No.

Q. Even with the meeting that you had with her shortly after her last day of work, did she ever report any kind of work-related accident?

A. No.

Q. Did she ever ask you for any medical treatment?

A. No.[5]

Claimant agreed she never requested medical treatment until her attorney requested it for her. She stated she did not request treatment because she believed respondent did not have workers compensation insurance.

Claimant testified on cross-examination:

Q. As I understand your testimony, you can't specify or know the date when you were injured, correct?

A. Correct.

Q. And you had testified at the discovery deposition that you put it in the logbook, but you reviewed the logbook and it's not mentioned in there, correct?

A. Correct.

Q. And you testified that you sent texts to [Ms. Valentin] about the back pain, but we don't have those either, correct?

A. Correct.

. . .

[5] P.H. Trans. at 108-109.

Q. While you were an employee of [respondent], you never asked for medical treatment?

A. Correct.[6]

Claimant continued working with no restrictions until her last day, April 5, 2015.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

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[6] *Id*. at 48.

> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The ALJ found claimant failed to sustain the burden of proving she provided notice within 20 days pursuant to K.S.A. 2014 Supp. 44-520. The undersigned agrees. Claimant presented no evidence that she advised respondent of the time, date, or place of her injury, nor did she present evidence that she provided to respondent any particulars of the injury. It must be apparent from the content of the notice the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2014 Supp. 44-555c(j).

Claimant testified that she was injured on March 5, 2015, while moving a client. There is no mention of the lifting incident in the hand-written log prepared by claimant on the date of accident. Claimant testified she told Trey Bicknell about the specific lifting incident. Mr. Bicknell denied being told of a specific accident. Mr. Bicknell testified he first became aware of claimant's back problem when she called out of a shift because of back pain. The call-in note on March 19, 2015, stated, "[Claimant] called in for her shift tonight because she said she went to the dr [*sic*] because her back was hurting."[9] Respondent logged a call-in the next day, March 20, 2015, advising claimant could not work because her back was still sore.

Claimant also testified she called Kate Valentin at 11:00 a.m. the day after the accident and told her she hurt her back assisting a client. Ms. Valentin denied the conversation took place. Ms. Valentin stated she first became aware claimant was suffering from back pain when Mr. Bicknell notified her of claimant's call-in from work because of back pain. Ms. Valentin stated she asked Mr. Bicknell how claimant hurt her back, but he did not know.

Claimant stated she texted Ms. Valentin from the hospital. While claimant could produce text messages from before and after the hospitalization, she testified she could not locate any text messages to Ms. Valentin during the time she was in the hospital. No other document showing notice during the hospitalization was placed in the record. Claimant testified she never asked respondent to provide medical treatment for her injury prior to hiring an attorney.

The Board has held in prior decisions complaints of pain do not necessarily constitute notice of an injury.[10] The record does not support a finding of notice required by K.S.A. 2014 Supp. 44-520.

CONCLUSION

Claimant failed to meet the burden of proving notice of an injury by accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated September 21, 2015, is affirmed.

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[9] P.H. Trans., Resp. Ex. B at 2.

[10] See *Bishop v. P1 Group, Inc.,* No. 1,065,448, 2014 WL 517228 (Kan. WCAB Jan. 27, 2014); *Lewis v. Sun Graphics, Inc.*, No. 1,031,707, 2007 WL 740432 (Kan. WCAB Feb. 28, 2007); *Shah v. Cessna Aircraft Company*, No. 1,002,287, 2003 WL 22994487 (Kan. WCAB Nov. 7, 2003).

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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